United States Court of Appeals

for the Second Circuit

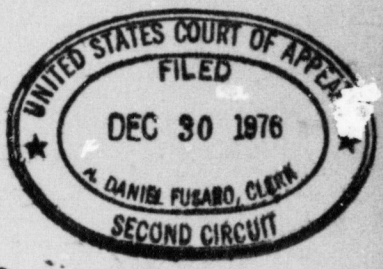
APPELLANT'S BRIEF

ORIGINAL

75-7462
76-7560

To be argued by
MORRIS WEISSBERG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT



B P/S

EXPERT ELECTRIC, INC., HENDRIX ELECTRIC, INC., ARGANO ELECTRIC CORP., ZIP ELECTRIC CO., INC., EUGENE IOVINE, INC., PHASE II ELECTRIC CORP., TAP ELECTRICAL SERVICES AND CONTRACTING, INC., RAYMOR ELECTRIC CORP., RUSSELL H. VENSK, INC., BISANTZ ELECTRIC CO., INC., ROBERT E. BURDEN ELECTRICAL CONTRACTOR, INC., and FIVE STAR ELECTRIC CORP.,

Plaintiffs-Appellants,

-against-

LOUIS L. LEVINE, individually, and as Industrial Commissioner of the State of New York,

Defendant-Appellee.

Docket #75-7462
Docket #76-7560

APPELLANTS' BRIEF

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APPELLANTS' BRIEF

PRELIMINARY STATEMENT

These are two appeals by the plaintiffs from two judgments of Judge Robert L. Carter, in the Southern District of New York, which granted defendant's motions, before answer, to dismiss the complaint.

The first notice of appeal is dated August 4, 1975, and it was docketed in this Court as #75-7462. It appealed from an order and memorandum decision #42854, dated July 24, 1975, which dismissed the complaint (A5; A7-23).

The second notice of appeal is dated November 15, 1976, and it was docketed in this Court as #76-7560. It appealed from an order and memorandum decision #45343, dated November 5, 1976, which dismissed the complaint.

On plaintiffs' motion, to which defendant consented, this Court made an order on December 8, 1976, which consolidated both aforesaid appeals.

QUESTIONS PRESENTED

1. Did the New York State Labor Department unconstitutionally deprive the plaintiffs of liberty and property without due process of law by refusing to register plaintiffs' apprentice training agreements with their own employees, pursuant to Regulation 601.8, which provided that after the Labor Department has deregistered an apprentice training program, an "employer participant" therein shall be ineligible to register its own apprentice training program for three years?

2. Did the Labor Department unconstitutionally deprive the plaintiffs of procedural due process of law by disqualifying them from registering their apprentice training agreements with their own employees, without giving them notice of reasons for such disqualification, and an evidentiary hearing thereon?

3. Did the Labor Department unconstitutionally discriminate against the plaintiffs, and deny them the equal protection of the laws, by deregistering their trade association's apprentice training agreement for apprentice training violations, without deregistering for similar violations their competitors' apprentice training agreement?

4. Is the Labor Department's administrative determination deregistering the apprentice training agreement of plaintiffs' trade association, and confirmation thereof by a State court, res judicata of this Federal suit by the plaintiffs for judgment that the Labor Department's

Regulation 601.8 unconstitutionally disqualified them from registering their own apprentice training agreements with their own employees?

The District Court (Carter, J.) decided the first three questions in the negative, and the last question in the affirmative. (A7-23; A24-29).

STATEMENT OF THE CASE

The Facts

Plaintiffs are electrical contractors, doing alteration and repair electrical work under contracts with commercial firms in private industry, and also doing more than $10,000.00 of governmental work annually under contracts with agencies of the Federal, New York State and New York City governments (A31).

Plaintiffs are members of United Construction Contractors Association, Inc., ("United") which made an agreement with Local 363, International Brotherhood of Teamsters ("Local 363"), whose members include journeymen and apprentice electricians, for training of apprentice electricians by their Joint Apprenticeship Committee ("JAC"). That agreement was registered by the Labor Department in 1971, as a continuation of registration

of prior similar agreements beginning in 1961 (A31).

Section 811(d) of the New York Labor Law empowers the Labor Department to register apprenticeship agreements and individual apprentices (A31).

In 1975, each plaintiff employed one or more registered apprentice electricians (A31).

On or about June 17, 1974, the defendant caused to be served on United, and on Local 363, a notice of proposed deregistration of their apprentice training agreements, which stated, in part, that United, Local 363, JAC (A41-44):

> "1. failed to meet its responsibilities under its master Apprenticeship program in that it failed to complete the training of apprentices so as to qualify as journeymen, in contravention of the purposes of Article 23 and specifically Section 810 of the said Article.
>
> 2. The following employers, members of the Joint Apprenticeship Committee have violated Article 8 of the Labor Law and the Apprenticeship Training Regulations in that they have failed to pay prevailing wages and supplements, employed unregistered apprentices, used apprentices in excess of the ratio provided in the apprenticeship agreements for the geographical area in which the work was performed:
> Abetta Electric Service Corporation***;
> Unity Electric Service Corporation ***;
> Iovine, Inc., *** ;
> Hylan Electric Co., Inc.*** ;
> Gottlieb Contracting Co., Inc.***
> Franco Electric Corp.,*** ;
> Mansfield Electric*** ."

Defendant held hearings on the said charges, by an Advisory Council on Apprenticeship Training.

On May 1, 1975, defendart approved a report by such Advisory Council on Apprenticeship Training, and cancelled the Labor Department's registration of the apprentice training agreement between United and Local 363 (A45-54).

On June 3, 1974, defendant amended his apprentice training regulations to read, in part, as follows (A32-33):

> Section 601.7(c)(4).
>
> "In each case in which deregistration is ordered, the Commissioner shall publish promptly in the state bulletin a notice of the order and shall notify the registrant. In addition, the Commissioner shall promptly notify all registered apprentices of the deregistration of the program; the effective date thereof; that such cancellation automatically deprives the apprentice of his individual registration; and that the deregistration removes the apprentice from coverage for State purposes."
>
> Section 601 8.
>
> "Reinstatement of program registration. Any apprenticeship program formally deregistered pursuant to this Part may not be reinstated for a period not to exceed 3 years, nor shall the sponsor or any employer or union participant be eligible to register any apprenticeship training program under any other name for such period." (Emphasis supplied)

Pursuant to defendant's above-quoted amended regulations, his aforesaid administrative determination of

May 1, 1975, automatically cancelled the Labor Department's registration of each apprentice electrician whom each plaintiff then employed; and it automatically disqualified each plaintiff for a period not to exceed three years, from registering with the Labor Department an apprenticeship training agreement in its own name as employer (A31-32), although section 816 of the New York Labor Law provides, in part:

> "For the purposes of this article an apprenticeship agreement is: (1) An individual written agreement between an employer and an apprentice, ***."

None of the plaintiffs committed any of the acts alleged in defendant's notice of proposed deregistration, in that none of the plaintiffs failed to pay prevailing wages and supplements, employed unregistered apprentices, or used apprentices in excess of the ratio provided in the apprenticeship agreement (A34; A57-58; A70-71).

None of the plaintiffs agreed to, authorized, ratified, or participated in any of the acts alleged in the notice of proposed deregistration, or had knowledge thereof (A34; A57-58; A70-71).

Section 811 of the New York Labor Law, in part, provides:

> "1. The industrial commissioner shall have the following powers and duties:
> * * *

(d) to register approved apprenticeship agreements, and upon performance thereof, to issue certificates of completion of apprenticeship;

* * *

(i) to adopt such rules and regulations as may be necessary for the effective administration of the purposes and provisions of this article;
(j) to perform such other duties as may be necessary to give full effect to the policies of the state and the provisions of this article."

Plaintiffs allege that section 501.8 of defendant's regulations, and his actions under color thereof, and under color of section 811 of the New York Labor Law, following his determination of May 1, 1975, which cancelled his registration of the apprenticeship training agreement between United and Local 363, in automatically disqualifying each plaintiff from registering its own apprentice training agreement with persons whom it wishes to employ as apprentice electricians, unconstitutionally ascribed to each plaintiff guilt by association for acts allegedly performed by certain named employers other than these plaintiffs, and for improper supervision of apprentice training by United and Local 363, and thereby the said Regulations, and defendant's actions implementing his Regulations, deprived each plaintiff of liberty and property without due process of law, contrary to section 1 of the Fourteenth Amendment to the Constitu-

tion of the United States, and, consequently, the said Regulation, and defendant's actions implementing it, are unconstitutional and invalid (A34-35).

A second claim for relief in the complaint alleged that the defendant based his notice of proposed deregistration, and his determination of deregistration of the apprentice training agreement between United and Local 363 upon complaints made to him by Local 3, which is a rival labor union to Local 363 (A37); that at the administrative hearings the Labor Department produced pursuant to subpoena duces tecum served by United, reports by the Labor Department's inspectors that they found 230 violations of apprenticeship and labor law provisions by contractors who employ only members of Local 3 and who are members of trade associations which have collective bargaining contracts with Local 3 (A37); that such violations have existed for many years without any action by the Labor Department to deregister Local 3's apprentice training program and contractors who have collective bargaining contracts with Local 3 (A37).

Plaintiffs allege that defendant's actions in deregistering the apprentice training program of United

and Local 363 for the reasons alleged in his notice of proposed deregistration, without deregistering plaintiffs' competitors who employ members of Local 3, for the aforesaid 230 violations of apprentice training regulations and labor laws found by the Labor Department's inspectors, discriminated invidiously against the plaintiffs, and denied them the equal protection of the laws (A37-38).

Prior Administrative Proceedings

The plaintiffs, as individual contractors, were not named by defendant as parties to any administrative proceeding; and the defendant made no administrative determination which named the plaintiffs.

On June 17, 1974, the defendant commenced an administrative proceeding in the Labor Department by serving notice of proposed deregistration upon United and Local 363.

Thereafter, the defendant conducted evidentiary hearings in the Labor Department, by an Advisory Council on Apprenticeship Training, which he appointed, and which consisted of three officials of AFL building trade unions, and three building contractors who employed members of AFL building trade labor unions. No member or officer of a Teamsters' Union served on such Advisory

Council.

On May 1, 1975, the defendant made an administrative determination which approved and adopted a report by the said Advisory Council on Apprentice Training, which sustained the charges against United and Local 363, and cancelled the Labor Department's registration of the apprentice training agreement between United and Local 363.

After the New York Courts confirmed the said administrative determination on June 2, 1976, 52 A.D.2d 371, the defendant issued an administrative order that contractors who were members of United will be disqualified from employing registered apprentices for three years from June 2, 1976, namely, until June 2, 1979.

Prior State Court Litigation

On July 2, 1975, United and Local 363 commenced a proceeding against the defendant under Article 78 of the New York Civil Practice Law and Rules for judicial review of the defendant's administrative determination of May 1, 1975, which sustained charges against them, and cancelled the Labor Department's registration of their apprentice training agreement.

On June 2, 1976, the Appellate Division, Third Department, of the New York Supreme Court, confirmed the said administrative determination, 52 A.D.2d 371. Thereafter, the Court of Appeals of the State of New York denied leave to appeal to that Court, and thereby the said State court litigation terminated on July 16, 1976.

PRIOR PROCEEDINGS IN THIS CASE IN THE DISTRICT COURT, AND IN THIS COURT

On May 22, 1975, the summons and complaint in this action was filed in the District Court for the Southern District of New York; and plaintiffs made a motion for a preliminary injunction, restraining the defendant from disqualifying them from registering their own apprentice training agreements with their own apprentices.

Without serving an answer, the defendant made a cross-motion to dismiss the complaint under Rule 12, F.R.C.P.

The District Court (Carter, J.) heard oral argument on such motion and cross-motion, after which it dismissed the complaint by memorandum decision and order No. 42854, dated July 24, 1975.

By notice of appeal dated August 4, 1975, plaintiffs appealed from the said order, and they docketed the said appeal as No. 75-7462.

Thereafter, on plaintiffs' motion, this Court made an order, dated September 2, 1975, which remanded the case to the District Court for the purpose of applying to that Court to vacate the judgment dismissing the complaint, and for a rehearing.

On November 6, 1975, the District Court granted a re-hearing, which it held on March 3, 1976, on which date it heard oral argument, and then directed a stay of proceedings in this action until after the decision in the case of "UNITED CONSTRUCTION CONTRACTORS ASSOCIATION v. LEVINE", which was awaiting oral argument of an appeal to the Appellate Division, Third Department of the New York Supreme Court.

On June 2, 1976, that Court made a decision which confirmed the defendant's administrative determination of May 1, 1975, which deregistered the apprentice training agreement of United, Local 363, JAC; and the Court of Appeals of the State of New York denied leave to appeal to that Court, terminating that litigation on July 16, 1976.

On June 29, 1976, the defendant again made a motion to dismiss the complaint, and for summary judgment on the ground that the Appellate Division decision in United Construction Contractors v. Levine, 52 A.D.2d 371, was

res judicata in this case, decision #45323.

By notice of appeal dated November 15, 1976, plaintiffs appealed to this Court, and they docketed their appeal as No. 76-7560.

By an order dated December 8, 1976, this Court consolidated both of the said appeals.

THE DECISIONS BELOW

I.

In its memorandum decision #42854, dated July 24, 1975, the District Court (Carter, J.) said that United, Local 363, and their Joint Apprenticeship Committee ("JAC") acted as plaintiffs' agent in registering their apprenticeship agreement (A14-15); that since the plaintiffs received and accepted the benefits of that apprentice training agreement, they are bound by the consequences of the failure of United, Local 363, JAC to meet their responsibilities under the apprenticeship training agreement (A15-16); and that as members of United, plaintiffs are chargeable with knowledge of violations of apprenticeship training agreement by other members of United, and of the failure of United, Local

363, JAC to carry out their responsibilities to complete the training of apprentices (A16-17), citing Phelps Dodge Refining Corp. v. FTC, 139 F.2d 393 (C.A.2, 1943).

The Court also said that there is no merit to plaintiffs' allegations that the Labor Department denied them equal protection of the laws by cancelling its registration of the apprentice training agreement for alleged violations of apprentice training regulations and labor laws, but taking no action whatever about violations of apprentice training regulations and labor laws which its own inspectors reported as committed by plaintiffs' competitors, who employed members of Locals3 and 25 of the electricians' union, which were rivals of Local 363, whose members plaintiffs employed; that the plaintiffs did not present evidence under oath to support such allegations at a hearing on their motion for a preliminary injunction (A18); and that such different treatment of violations of apprentice training regulations and labor laws may be due to differences in the violations, whose nature plaintiffs failed to show, so that they failed to prove their allegations that they were denied the equal protection of the laws (A19-21).

II.

In its memorandum decision #45343, dated November 5, 1976, the District Court (Carter, J.), said that the plaintiffs as individual members of United, were represented by United at the administrative hearing on the proposed cancellation of the Labor Department's registration of the apprentice training agreement of United, Local 363, JAC, and, hence, they were not entitled to individual notice, although they were sent copies of the notice that was given to United, Local 363, JAC (A27); and that (A28):

> "As long as plaintiffs' interests were represented at the above proceeding by one having authority to represent him, they are bound by the judgment, although they were not formally a party to the litigation."

The Court also said that the State Court's decision in "United v. Levine", 52 A.D.2d 371, rejected contentions by the petitioners in that case that they are not legally responsible for violations of apprentice training regulations and labor laws allegedly committed by some members of United; that the State Court decision also rejected their claim that the Labor Department unconstitutionally denied them the equal protection of the laws; and that the State Court's decision on these contentions is binding and res judicata in this case (A28-29).

POINT I.

THE NEW YORK LABOR DEPARTMENT UNCONSTITUTIONALLY DEPRIVED THE PLAINTIFFS OF LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW BY REFUSING TO REGISTER THEIR APPRENTICE TRAINING AGREEMENTS WITH THEIR OWN EMPLOYEES, PURSUANT TO ITS REGULATION 601.8, WHICH PROVIDED THAT AFTER THE LABOR DEPARTMENT HAS DEREGISTERED AN APPRENTICE TRAINING PROGRAM, AN "EMPLOYER PARTICIPANT" THEREIN SHALL BE INELIGIBLE TO REGISTER ITS OWN APPRENTICE TRAINING PROGRAM FOR THREE YEARS.

I.

After the Labor Department deregistered the apprentice training program of United, Local 363, JAC, by its administrative determination, dated May 1, 1975, which sustained certain charges dated June 17, 1974, each plaintiff, as an individual employer, applied to the Labor Department, for registration of its own apprentice training agreement with its own apprentice electricians (A34).

Sections 810 and 811 of the New York Labor Law gave each plaintiff a New York statutory right to register with the Labor Department its own apprentice training agreement with apprentices in its employ, by defining an "apprenticeship agreement" as including:

> "An individual written agreement between an employer and an apprentice" (section 816);

and by providing that:

> "The industrial commissioner shall have the *** powers and duties*** to register approved apprenticeship agreements***." (Section 811, subd. 1, d).

The Labor Department's Regulation 601.8, adopted June 3, 1974, provided (A33):

> "Any apprenticeship program formally deregistered pursuant to this Part may not be reinstated for a period not to exceed 3 years, nor shall the sponsor or any employer or union participant be eligible to register any apprenticeship training program under any other name for such period." (emphasis supplied)

Based on the above-quoted provision in its Regulation 601.8 that an "employer participant" in an apprentice training program which the Labor Department deregistered shall not be eligible for three years:

> "to register any apprenticeship training program under any other name for such period",

the Labor Department took no action upon applications for registration of individual apprentice training programs which each plaintiff filed with it in May, 1975 (A32-34).

The Labor Department's refusal to register each plaintiff's individual apprentice training program, under its Regulation 601.8, because it had deregistered the apprentice training program of United, Local 363, JAC, in which each plaintiff was a participant, uncon-

stitutionally deprived each plaintiff of liberty and property without due process of law, by applying to each plaintiff an irrebuttable conclusive presumption that each plaintiff agreed to, authorized, ratified, participated in and had knowledge of the acts which the Labor Department charged and found against United, Local 363, JAC, as its reasons for deregistration of their apprentice training program.

Such irrebuttable conclusive presumption was contrary to the allegations in the complaint (A34), in the supporting affidavit (A57), and in plaintiff's Statement under District Court Rule 9(g) (A70-71), that the plaintiffs did not authorize, ratify, participate in or have knowledge of such acts.

Members of an association or corporation can not constitutionally be held individually legally responsible criminally or civilly, or be disqualified, or made ineligible for a statutory benefit or privilege, upon an administrative or judicial determination that the association or corporation of which they are members committed a crime, or some wrongful civil act which disqualified it from such statutory benefit, privilege or activity.

Instead, it is necessary to show that the individual member whom the Government seeks to hold criminally or

civilly responsible for actions of the corporation or association of which he is a member, or to whom it seeks to deny eligibility for a statutory benefit or privilege because of actions by a corporation or association of which he is a member, authorized, ratified, participated in or had knowledge of the actions for which such corporation or association was adjudged criminally or civilly responsible, or for which it was denied eligibility for a statutory benefit or privilege.

In United States v. Brown, 381 U.S. 437, 455-456 (1964), the Court said:

> "In a number of decisions, this Court has pointed out the fallacy of the suggestion that membership in the Communist Party, or any other political organization, can be regarded as an alternative, but equivalent, expression for a list of undesirable characteristics. For, as the Court noted in Schneiderman v. United States, 320 U.S.118, 136, 'under our traditions beliefs are personal and not a matter of mere association and... men in adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms or asserted principles".

In Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 179 (1950), a concurring opinion by Mr. Justice Douglas said:

> "Guilt under our system of government is personal. When we make guilt vicarious we borrow from systems alien to ours and ape our enemies. These short-cuts may at times seem to serve noble purposes; but we depreciate ourselves in indulging in them.."

In Schware v. Board of Bar Examiners, 353 U.S. 232, 246 (1956), the Court said:

> "***it cannot automatically be inferred that all members share their evil purposes or participate in their illegal conduct."

In Hartford Empire Co., v. United States, 323 U.S. 386, 405-406 (1944), the Court said:

> "There is no evidence that, as a director of Hartford, he knew, approved, or voted in favor of any of the actions taken pursuant to the conspiracy. *** Collins is found to have been, and still to be, a member of the Association's statistical committee, but the bill does not charge him individually with any conduct in that relation. Of course, any injunction against the Association and its officers and agents will bind him so long as he remains in that relationship. *** the evidence is not persuasive of participation in any conspiracy charged or proved. We are of opinion that as to Collins, the bill should be dismissed."

In Vandervelde v. Put & Call Brokers & Dealers Association, 344 F.Supp. 118, 155, 156 (S.D.N.Y. 1972), the Court said:

> "The key element of proof for linking an Association member to the acts of his organization is a showing that he knew of and condoned the acts in issue.***
>
> * * *
>
> The evidence as to Krinski & Co., however, is insufficient to justify a finding of liability. Krinski played no direct or indirect role in the Vandervelde controversy and the firm itself, under these circumstances, has not been shown to have any connection to the matters at issue except that of a 'mere member'. The complaint is dismissed as to Krinski & Co."

In Gem Music Corp., v. Taylor, 294 N.Y. 34, 37, the Court said:

> "This first cause, it will be observed, does not assert that any of the corporate defendants participated in the alleged conspiracy or ratified that wrong or profited therefrom. Indeed this first cause does not even impute knowledge of the existence of such a conspiracy to any of the corporate defendants."

See, also: Sperry Products, Inc., v. Association of American Railroads, 132 F.2d 408 (C.A. 2, 1941), certiorari denied 319 U.S. 744 (1942).

II.

In its notice of proposed deregistration, the Labor Department alleged the following grounds for deregistering the apprentice training agreement of United, Local 363, JAC (A41-44):

> "1. The United Construction Contractors Association, Inc., and Local #363, International Brotherhood of Teamsters Joint Apprenticeship Committee has failed to meet its responsibilities under its master Apprenticeship program in that it failed to complete the training of apprentices so as to qualify as journeymen, in contravention of the purposes of Article 23 and specifically Section 810 of said Article.
>
> 2. The following employers, members of the Joint Apprenticeship Committee have violated Article 8 of the Labor Law and the Apprenticeship Training Regulations in that they have failed to pay prevailing wages and supplements, employed unregistered apprentices, used apprentices in excess of the ratio provided in the apprenticeship agreements for the geographical area

in which the work was performed:
Abetta Electric Service Corporation***;
Unity Electric Co.*** ;
Iovine, Inc.*** ;
Hylan Electric Co. Inc.*** ;
Gottlieb Contracting Co. Inc.*** ;
Franco Electric Corp. *** ;

In its administrative determination, the Labor Department made the following Findings (A53):

"Based upon the whole record I find:
1. From the inception of the program in 1961 until 1973, not one of the 574 apprentices achieved completion of the program or certifiable journeymen status.
2. The sponsor not only failed to meet is obligations to provide related classroom instruction but by its own actions made it impossible for any apprentice to obtain the necessary 144 hours of related classroom instruction.
3. The sponsor in a Joint Apprenticeship Committee consists of the union and each contractor having a collective bargaining agreement with said union. Therefore the acts of each participating contractor in an apprenticeship program is attributable to the sponsor.
4. The sponsor failed to take any substantial corrective action with respect to violations of the Labor Law despite the fact that such violations were matters of public record.
5. The record indicates that the sponsor, after agreeing to correct deficiencies in the program, failed to do so."

In its above-quoted charges against United, Local 363, JAC, the Labor Department did not allege that any of the individual plaintiffs herein (except Eugene Iovine, Inc.), committed any violations of apprentice training regulations or labor laws; and it made no such finding.

While the Labor Department's above-quoted notice of proposed deregistration alleged that Eugene Iovine, Inc., committed (A42): "Underpayment of prevailing rates. Failure to use apprentices in the proper ratio", its above-quoted Findings show that it made no finding to such effect (A53).*

We submit that under the cases cited and quoted above, the Labor Department could not constitutionally disqualify each plaintiff from registering its own apprentice training agreements with its own apprentices, by adopting a regulation that disqualification of a trade association shall automatically disqualify all its members from registering an apprentice training agreement, and thereby substitute a conclusive presumption that each member of the association authorized, ratified or participated in the association's violations of apprentice training regulations and labor laws, for evidence of wrongful or illegal acts committed by a named member of the association, or that he authorized, ratified or participated in the association's wrongful or illegal acts, which the Constitution requires in

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* Eugene Iovine testified at the administrative hearing that his firm did not commit the acts alleged against it.

order to hold an individual member legally responsible for acts committed by the association, or by other members.

III.

The District Court's decision #45343, dated November 5, 1975, said (A29):

> "*** plaintiffs' claim that they were denied due process because they have been held responsible for acts of JAC, United and Local 363 which they did not authorize, ratify or participate in, was alleged in the 12th paragraph of the state court petition, and rejected by the court when it stated that 'the administrative determination to adopt regulation section 601.7(c) has reasonable basis in law and must be sustained'."

But the complaint herein seeks to invalidate Regulation 601.8, and not Regulation 601.7(c), on the ground that 601.8 unconstitutionally disqualifies the plaintiffs by providing that for three years after the Labor Department deregisters an apprentice training program:

> "*** the sponsor or any employer or union participant (shall not) be eligible to register any apprenticeship training program ***." (emphasis supplied)

Therefore, the State Court's decision sustaining the validity of Regulation 601.7(c) does not support the validity of Regulation 601.8, which unconstitutionally disqualifies members of an employer's association, not

for their own acts, but solely on the basis of their membership in an employer's association whose apprentice training agreement was deregistered by the Labor Department.

Plaintiffs recognize that as members of United they are bound by the Labor Department's administrative determination sustaining its charges against United, Local 363, JAC, and deregistering United's apprentice training agreement. Plaintiffs also recognize that they are bound by the State Court's judgment confirming that administrative determination, and that under regulation 601.7(c) such judicially confirmed administrative determination terminated plaintiffs' right to employ registered apprentices under such cancelled registration.

However, plaintiffs allege in their complaint that regulation 601.8 unconstitutionally disqualified them from registering their own apprentice training agreements, solely on the ground that they were "employer participants" in the deregistered apprentice training agreement of United, Local 363, JAC.

IV.

The District Court's decision #42854, dated July 24, 1975, said (A16):

> "It is fundamentally disingenuous for these plaintiffs, who have reaped the benefits of the apprenticeship program, now to argue that

> they are free from the statutory and regulatory commitments and restrictions which the Master Agreement bound the participants to observe and from the consequences of failing to do so."

In support of its above-quoted statement, Decision #42854 quoted Phelps Dodge Refining Corp., v. FTC, 139 F.2d 393, 396-397 (C.A.2, 1943), where the Court said:

> "Granted that his mere membership does not authorize unlawful conduct by the association, once he is chargeable with knowledge that his fellows are acting unlawfully his failure to dissociate himself from them is a ratification of what they are doing."

The Phelps Dodge decision further said (139 F.2d at 396):

> "The stipulation of facts states that the Association, organized in 1934, has acted as a clearing house for the exchange of information submitted by its members, including reports as to the sales of various types of insecticides, fungicides and related items, together with the prices, terms and discounts at which said items are sold, or offered to be sold, and in some instances including advance notice of future prices. Thus it admits of no doubt that the association and some of its members were engaged in price fixing." (Emphasis supplied)

In this case, unlike the Phelps Dodge case, the complaint and plaintiffs' Statement under District Court Rule 9(g) expressly alleged (A34; A57; A70-71), that no plaintiff authorized, ratified, participated in or had knowledge of the acts alleged in defendant's notice of proposed deregistration as grounds for deregistering the apprentice training agreement of United, Local 363, JAC.

In the Phelps Dodge case, the Court further said (139 F.2d at 396-397):

> "All that the record discloses about petitioner Demmon is that he was a director of the association and held some unnamed office in Stauffer. It does not appear that he ever attended a directors' meeting or knew anything about the illegal activities of the association or the supplying and receipt of price lists and dealer lists by Stauffer. The ordinary doctrine is that a director, merely by reason of his office, is not personally liable for the torts of his corporation; he must be shown to have personally voted for or otherwise participated in them (citations). The doctrine seems applicable here. The finding against the petitioner Demmon is therefore unsupported, and his inclusion by name in the order is not sustained."

V.

The District Court's decision #42854, dated July 24, 1975, also said (A17):

> "It is simply incredible for plaintiffs to contend that they were unaware of the massive violations which the hearing panel found and the Commission endorsed."

Although the complaint was served in May, 1975, the defendant has not yet served an answer, or any affidavit denying the allegations in the complaint, the supporting affidavit, or plaintiff's Statement under District Court Rule 9(g) (A34; A57; A70-71), that no plaintiff authorized, ratified, participated in, or had knowledge of the acts alleged in defendant's notice of proposed deregistration as grounds for deregistering the apprentice training agreement of United, Local 363, JAC.

Upon defendant's first notice to dismiss the complaint, filed May 30, 1975, the rules required the allegations of the complaint to be deemed admitted, for the purpose of that motion. Yet, the first decision below declared "incredible" plaintiffs' allegation that they did not authorize, ratify, participate in or have knowledge of the acts alleged in defendant's notice of proposed deregistration.

Upon defendant's second motion to dismiss the complaint, and for summary judgment, filed June 29, 1976, defendant did not file a statement under District Court Rule 9(g) of facts which defendant deemed admitted; and he did not contradict plaintiffs' Statement under Rule 9(g), in which plaintiffs listed among factual issues which required a trial and thus precluded summary judgment, a statement that no plaintiff authorized, ratified, participated in, or had knowledge of the acts alleged in defendant's notice as grounds for deregistering the apprenticeship agreement of United, Local 363, JAC.

VI.

The District Court's decision #42854, dated July 24th, 1975, also said (A17):

> "The fact that not one of the 574 apprentices achieved completion of the training program during a span of a dozen years, and that not

> one completed 144 hours of required related instruction should have put each participating employer upon inquiry notice that the sponsor and participating employers were not fulfilling their obligations under the program. Plaintiffs' failure to dissociate themselves from the sponsor is thus a ratification of the condemned activities. 139 F.2d at 396. Plaintiffs' first due process contention is devoid of merit."

Undisputed testimony in the administrative hearing by Henry Burfeind, supervisor of vocational training of the Board of Education of the City of New York, contradicted the Labor Department's charge that no apprentice completed the training program. Mr. Burfeind testified (T402-404):

> "It would not be correct to say that no student completed the -- had completed satisfactorily the course of study that we had prescribed for this apprentice."

Undisputed documentary evidence in the administrative hearing established that when the Labor Department told United, Local 363, JAC, that apprentices were required to attend evening classroom instruction for two sessions of two hours each twice weekly, for 36 weeks per year, amounting to 144 hours per year, instead of one 3-hour session weekly, times 36 weeks, amounting to 108 hours yearly, they complied immediately and wrote to the Labor Department on November 20, 1973 (T488-491; Dept. Exh. 18) that apprentices:

> "will complete 144 hours of related instruction by the end of June, 1974, with the cooperation of the Board of Education as discussed in our meeting of October 13, 1973."

The Labor Department's administrative findings that no apprentice completed the training program, and that United, Local 363, JAC, did not correct deficiencies in the operation of the apprentice training program, are not binding on the Federal Courts, which may make their own independent examination and determination whether such alleged conditions existed during operation of the apprentice training program by United, Local 363, JAC, and whether the plaintiffs are legally responsible for and subject to individual disqualification for conditions which existed during operation of the apprentice training program by United, Local 363, JAC.

In Stein v. New York, 346 U.S. 156, 181 (1952) the Court said:

> "Of course, this Court cannot allow itself to be completely bound by state court determination of any issue essential to decision of a claim of federal right, else federal law could be frustrated by distorted fact finding."

In Niemotko v. Maryland, 340 U.S. 368, 271 (1950) the Court said:

> "In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded."

In Ker v. California, 374 U.S.23, 34 (1962) the Court said:

> "While this Court does not sit as in nisi prius to appraise contradictory factual questions,

> it will, where necessary to the determination of constitutional rights, make an independent examination of the facts, of findings, and the record so that it can determine for itself whether in the decision as to reasonableness the fundamental -- i.e., constitutional -- criteria established by this Court have been respected."

Even if United, Local 363, JAC, had failed to complete the training of apprentices, we submit that the individual plaintiffs were not chargeable with knowledge thereof, nor with ratification of deficiencies in the supervision of apprentice training by United, Local 363, JAC, particularly, in the light of the allegations of the complaint, the supporting affidavit, and the Statement under District Court Rule 9(g) (A34; A57; A70-71) that the plaintiffs did not authorize, ratify or participate in such deficiencies in the supervision of apprentice training by United, Local 363, JAC, and that they had no knowledge thereof.

POINT II.

THE LABOR DEPARTMENT UNCONSTITUTIONALLY DEPRIVED THE PLAINTIFFS OF PROCEDURAL DUE PROCESS OF LAW BY DISQUALIFYING THEM FROM REGISTERING THEIR OWN APPRENTICE TRAINING AGREEMENTS WITH THEIR OWN EMPLOYEES, WITH OUT GIVING THEM NOTICE OF REASONS FOR SUCH DISQUALIFICATION, AND AN EVIDENTIARY HEARING THEREON.

I.

Without serving on the plaintiffs notice of reasons for disqualifying them from registering their own apprentice trai ng agreements with their own apprentices, and without giving them an evidentiary hearing thereon, the Labor Department disqualified the plaintiffs from registering with it their own apprentice training agreements, based solely on the provision in its Regulation 601.8 that an "employer participant" in an apprentice training program which the Labor Department has deregistered shall be ineligible for three years from registering its own apprentice training agreement.

The Labor Department's disqualification of the plaintiffs from registering with it their own apprentice training agreements, and from employing their own registered apprentices, without giving them notice of reasons for such disqualification, and an evidentiary hearing thereon, unconstitutionally deprived them of procedural due process of law.

In Baldwin v. Hale, 68 U.S. 223, 233 (1863), the Court said:

> "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified."

In Wisconsin v Constantineau, 400 U.S. 433, 437 (1970) the Court said:

> "Where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."

In Willner v. Committee on Character and Fitness, 373 U.S. 96. 103, 105 (1962) the Court said:

> " *** procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood ***
> * * *
> Petitioner was clearly entitled to notice of and a hearing on the grounds for his rejection either before the Committee or before the Appellate Division."

In Greene v. McElroy, 360 U.S. 474, 496-497 (1958), the Court said:

> "*** where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the government's case must be disclosed to the individual so that he has the opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists

> of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers, or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment. *** This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal case *** but also in all types of cases where administrative *** actions were under scrutiny."

II.

The District Court's decision #42854, dated July 24, 1975, said (A18-19):

> "Plaintiffs' second due process assertion -- that they were denied procedural due process since the notice of proposed deregistration did not name plaintiffs individually -- requires no extended reply.
>
> * * *
>
> The notice of proposed deregistration was served on both United and JAC; additionally all plaintiffs received copies of that notice on the same day. A hearing was requested, notice of the hearing was sent to United and JAC, and both entities were represented there by counsel; in fact, the same counsel represented plaintiffs in this action. One of the plaintiffs in this action, Eugene Iovine, Inc., appeared and testified at one of the hearings. Plaintiffs, then, as members of United and as participating employers in the JAC, received actual and constructive notice of the proposed deregistration, and were not denied any opportunity to be heard."

The District Court's decision #45343, dated November 5, 1976, said (A27):

"With respect to plaintiffs' first claim, it is apparent that notice of the proposed deregistration was served on both United and JAC, the named parties in the deregistration hearing. Insofar as both United and JAC represented the interests of the participating employers in the apprenticeship program, it is apparent that they were acting on behalf of the plaintiffs' interests at the deregistration hearings. Therefore, notice to United and JAC was sufficient and the individual members of these organizations were not entitled to notice. See Rosenfeld v. Black, 336 F. Supp. 84, 92 (E.D.N.Y. 1971). Moreover, the individual employers did in fact receive actual notice since they were sent copies of notice given to United and JAC. Accordingly, the contention that plaintiffs' due process rights were violated is without merit."

The notice of proposed deregistration of the apprentice training agreement of United, Local 363, JAC, which the Labor Department mailed to the plaintiffs was not due process.

That notice did not name the plaintiffs as parties to an administrative deregistration proceeding before the Labor Department. It did not allege that the plaintiffs, individually, should be disqualified from registering their own apprentice training agreements because they, individually, were legally responsible and subject to disqualification upon the Labor Department's charge that (A41-45):

"1. The United Construction Contractors Association, Inc., and Local #363, International Brotherhood of Teamsters Joint Apprenticeship Committee has failed to meet its responsibilities under its master Apprenticeship program in that it failed to complete the training of apprentices so as to qualify as journeymen ***";

and it did not allege that the plaintiffs should be disqualified from registering their own apprentice training agreements because they, individually, were legally responsible and subject to disqualification upon the Labor Department's charge that (A41-45):

> "2. The following employers, * members of the Joint Apprenticeship Committee have violated Article 8 of the Labor Law and the Apprenticeship Training Regulations ***."

Although the Labor Department mailed to the plaintiffs copies of its Notice of Proposed Deregistration of the apprentice training agreement of United, Local 363, JAC, it does not claim that it gave notice of administrative hearing to the plaintiffs, or that plaintiffs had a legal right to attend and to participate in such administrative hearing by presenting evidence, and cross-examining witnesses.

The plaintiffs also had no legal right to ask the New York courts to judicially review the Labor Department's administrative determination of May 1, 1975, which sustained its charges and cancelled its registration of the apprentice training agreement of United, Local 363, JAC. Bailey v.

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* other than the plaintiffs herein

Richardson, 341 U.S. 918 (1950); Anti-Fascist Committee v. McGrath, 341 U.S. 123, 186 (1950); (concurring opinion by Jackson, J.).

Since the individual plaintiffs were not entitled to notice of the administrative proceedings against United, Local 363, JAC, the administrative determination in such proceedings, and the State Court's decision confirming such administrative determination could not constitutionally disqualify the plaintiffs for acts charged against United, Local 363, JAC, which the plaintiffs did not authorize, ratify, or participate in.

In Fox Publishing Corp., v. United States, 366 U.S. 683, 691 (1960), it was decided that the plaintiff, as a member of the American Society of Composers, Authors and Publishers, ("ASCAP") had no legal right to intervene in a pending anti-trust action in which a consent judgment had been made in favor of the United States against ASCAP.

The Court said:

> "*** before the inadequacy of ASCAP's representation of appellants' interests in the consent decree negotiations can give rise to a right of intervention, appellant must further demonstrate that they are or may be bound by the judgment on the litigation. ***
>
> * * *
>
> *** appellants' arguments as to a divergence of interests between themselves and ASCAP proves too much, for to the extent that it is valid appellants should not be considered as members of the same class as the present defendants, and therefore are not 'bound'. "

POINT III

THE LABOR DEPARTMENT UNCONSTITUTIONALLY DISCRIMINATED AGAINST THE PLAINTIFFS, AND DENIED THEM THE EQUAL PROTECTION OF THE LAWS, BY DEREGISTERING THEIR TRADE ASSOCIATION'S APPRENTICE TRAINING AGREEMENT FOR APPRENTICE TRAINING VIOLATIONS, WITHOUT DEREGISTERING FOR SIMILAR VIOLATIONS THEIR COMPETITORS' APPRENTICE TRAINING AGREEMENT.

I.

The Labor Department's deregistration of the apprentice training agreement of United, Local 363, JAC, under which plaintiffs employed members of Local 363 of the Teamsters Union, for apprentice training violations, without deregistering for similar apprentice training violations a different apprentice training agreement under which plaintiffs' competitors employed members of Local 3 of the Electricians' Union, which was a rival of Local 363 of the Teamsters Union, discriminated invidiously against the plaintiffs, and denied to the plaintiffs the equal protection of the laws.

Such unequal application and enforcement of the apprentice training regulations eliminated the plaintiffs from the business of competitive bidding for governmental contracts for electrical work, and gave to their competitors, who employed members of Local 3, a monopoly of

competitive bidding for such governmental work.

Such selective prosecution of plaintiffs' trade association, but not of the trade association of plaintiffs' competitors, constituted application and enforcement of apprentice training regulations "with an evil eye and an unequal hand", which denied to plaintiffs the equal protection of the laws. Yick Wo v. Hopkins, 118 U.S. 356, 373-374 (1885); People v. Walker, 14 N.Y.2d 901.

The Labor Department could not constitutionally prosecute violations of apprentice training regulations by a trade association whose members did not employ members of Local 3, without also prosecuting similar violations by a trade association whose members employed members of Local 3.

In Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 531 (1948) the Court said:

> "The constitutional right of workers to assemble, to discuss and formulate plans for furthering their own self-interest in jobs cannot be construed as a constitutional guarantee that none shall get and hold jobs except those who will join in the assembly or will agree to abide by the assembly's plans."

See, also: American Federation of Labor v. American Sash & Door Co., 335 U.S. 538 (1948); Truax v. Raich, 239 U.S. 33,

39-41 (1915).

In analogous cases, it was held that the government can not discriminate in favor of contractors who employ members of labor unions by awarding government contracts to them and withholding awards from contractors who do not employ union members. Master Printers Assn. v. Board of Trustees of Junior College, 355 F. Supp. 1355, 1356 (D. Ill., 1973); Anthony P. Miller, Inc., v. Wilmington Housing Authority, 165 F.Supp. 275, 280 (D. Del., 1958); Davenport v. Walker, 57 App. Div. 221, 68 N.Y.S. 161; State ex. rel. United Dist. Heating v. State Office Building Commission, 123 Ohio St. 301, 181 N.E. 129; Miller v. Des Moines, 143 Iowa 409, 122 N.W. 226.

II.

The District Court's decision #42854, dated July 24, 1975 said (A19-20):

> "Plaintiffs claim that the Commissioner's failure to invoke corrective procedures against these groups constitutes an equal protection violation. Yet, when given the opportunity to support this claim with some modicum of proof, plaintiffs refused. The Court, confronted with bare allegations which neither set out the nature of the purported violations, nor the specification of inaction by the Commissioner, is thus constrained to conclude that there is no substance to the equal protection claim."

Here, again, the Court below deemed the allegations of the complaint factually insufficient, even though de-

fendant served no answer. The Court below simply declined to believe the allegations of the complaint, although the rules provide that on a motion to dismiss a complaint its allegations are deemed admitted.

The Court below also did not consider and give effect to the following statement filed by plaintiffs under District Court Rule 9(g) in opposition to defendant's motion for summary judgment (A72-73):

> "12. The National Labor Relations Board has sustained decisions by Administrative Law Judges Herzel E. Plaine *** and Anne Schlezinger *** that Local 3 committed unfair labor practices, including violence against contractors, destruction of property, designed to eliminate the plaintiffs and other non Local 3 contractors from the electrical contracting industry in New York City, by exerting pressure on Federal, State and New York City governmental officials within the New York metropolitan area not to deal with the plaintiffs, and not to award governmental contracts to the plaintiffs, even when they are the lowest competitive bidders therefor, and to cancel such contracts after award thereof and during performance thereof, and to disqualify the plaintiffs from bidding thereon; and by preventing and hindering plaintiffs' performance of work thereunder by physical violence, threats of violence, damage to property, strikes, picketing, preventing delivery of materials and supplies to job sites, and other actions."

On September 2, 1975, this Court granted plaintiffs' motion to remand the first appeal to the District Court for the purpose of applying for re-hearing to present evidence in support of the allegations in their complaint,

including their allegations that the Labor Department discriminated against them and denied them the equal protection of the laws, but the District Court declined to receive any evidence at the rehearing.

The complaint alleged (A37, par. 24) that the defendant based his charges against United, Local 363, JAC, upon complaints made to him by Local 3. This, itself, is clear evidence of unconstitutional discrimination against plaintiffs and in favor of Local 3, which denied to plaintiffs the equal protection of the laws.

The complaint also alleged (A37, par. 25) that defendant's own inspectors found 230 violations of apprenticeship regulations by contractors who employ members of Local 3; that such violations existed for many years, without disciplinary action thereon by defendant (A37, par. 26); and that thereby defendant denied to plaintiffs the equal protection of the laws (A37-38, par. 27).

The reason that plaintiffs were not able to submit such inspectors' violation reports in evidence is because at the administrative hearing the hearing officer declined to receive them in evidence, thereby clearly discriminating unconstitutionally against the plaintiff. See: People v. Walker, 14 N.Y.2d 901.

To prove their allegations that they were denied the equal protection of the laws, it was not necessary for the

plaintiffs to show that the violations committed by their competitors were identical with those charged in the notice of proposed deregistration served on United, Local 363, JAC. It was sufficient that they were described in the complaint as violations of apprentice training agreements and regulations. Yet, the first decision below considered possible differences in the violations as a reason for defendant's selective prosecution of the violations which it charged against United, Local 363, JAC, without prosecuting the violations which the inspectors found were committed by plaintiffs' competitors, who employ members of Local 3.

III.

The District Court's decision #45343, dated November 5, 1976, said (A29):

> "***plaintiffs' claim, that they were denied equal protection because plaintiffs' program has been deregistered while no similar action has been taken against their competitors' program, was alleged in the 29th paragraph of the state court petition and rejected when the court stated that: 'the record does not sustain the petitioners' claim that respondent discriminated against petitioners in the cancellation of their agreement'."

The State Court petition by United, Local 363, JAC, pleaded only their own claim that the Labor Department denied them the equal protection of the laws by deregistering their apprentice training agreement but not the

agreement registered by contractors who employ members of Local 3.

United, Local 363, JAC could only plead their own constitutional claims, and not those of plaintiffs.

For the reasons discussed in Point IV, infra, even if United, Local 363, JAC had pleaded plaintiffs' constitutional claims that the Labor Department denied to plaintiffs the equal protection of the laws, a judgment dismissing such claim would not be res judicata, and it would not bar the plaintiffs from pleading such constitutional claim in their own complaint herein.

POINT IV.

THE LABOR DEPARTMENT'S ADMINISTRATIVE DETERMINATION DEREGISTERING THE APPRENTICE TRAINING AGREEMENT OF PLAINTIFFS' TRADE ASSOCIATION, AND CONFIRMATION THEREOF BY A STATE COURT, WAS NOT RES JUDICATA OF THIS FEDERAL SUIT BY THE PLAINTIFFS FOR JUDGMENT THAT THE LABOR DEPARTMENT'S REGULATION 601.8 UNCONSTITUTIONALLY DISQUALIFIED THEM FROM REGISTERING THEIR OWN APPRENTICE TRAINING AGREEMENT WITH THEIR OWN EMPLOYEES

I.

The decision of the Appellate Division of the New York Supreme Court in "UNITED CONSTRUCTION CONTRACTORS ASSOCIATION et al. v. LEVINE", 52 A.D.2d 371, only confirmed the Labor Department's administrative determination which sustained charges against United, Local 363, JAC, and deregistered their apprentice training agreement.

That State Court decision did not consider, and it did not decide the constitutionality of section 601.8 of the Labor Department's Regulations that the Labor Department's deregistration of a sponsor of an apprentice training agreement automatically disqualifies and makes ineligible for three years every "employer participant" in such sponsor from registering its own apprentice training agreement.

No such issue was pleaded in United's petition, nor decided by the State Court. Indeed, it could not

be pleaded and presented to the State court by United, because it is elementary that a party can only plead its own constitutional claims, and not those which affect some person who is not a party to the litigation, not even if such non party is a member of an association or group, which attempts to plead such constitutional claim on behalf of such member.

In Kersh Lake District v. Johnson, 309 U.S. 485, 494 (1940), the Court said:

> "The fact that the Commissioners in the injunction proceedings against the District, unsuccessfully attempted to interpose defenses peculiar and personal to the individual landowners cannot foreclose the individual landowners, who were not present, from thereafter pleading a defense otherwise valid."

Here, too, plaintiffs' allegations that they did not authorize, ratify, participate in, or have knowledge of the violations charged against United, Local 363, JAC, in the Labor Department's notice of proposed deregistration of their apprentice training agreement, is a claim which is "peculiar and personal" to the plaintiffs; and it was not presented to or decided in the prior administrative proceedings, nor by the State Court's confirmation of the administrative determination. Therefore, res judicata does not bar the plaintiffs from pleading such "personal and peculiar" claims in this Federal suit.

In Citizens For Community Local Action v. Ghezzi, 386 F.Supp. 1, 8 (W.D.N.Y. 1974) the Court said:

> "*** private citizens who are members of the plaintiff class in the instant action are not bound by the judgment in the prior action purportedly brought on their behalf, since they were not formal parties to that action and there is no basis upon which to hold them in privity with Niagara County. See Williamson v. Bethlehem Steel Corp., 468 F.2d 1201, 1203-1204 (2 Cir. 1972) cert. denied 411 U.S. 931 (1973); 1B Moore, Federal Practice, Sec. 0.411(1) (2d ed. 1974).
>
> Absent statutory or contractual authority, a person ordinarily cannot be bound without his consent by a judgment in a prior action to which he was not a party simply because a party in that litigation purported to represent all individuals who share an interest in the subject matter of the action. Dudley v. Meyers, 422 F.2d 1389, 1393-94 (3 Cir. 1970); 1B Moore supra Sec. 0.411(1) at 1253, and Sec. 0.411 (3) at 1423. Cf. Kersh Lake Drainage District v. Johnson, 309 U.S. 485 (1940), United States v. Kabinto, 456 F.2d 1087 (9 Cir.) cert. denied 409 U.S. 842 (1972)."

II.

In Herendeen v. Champion International Corp., 525 F.2d 130 (C.A. 2, 1975) - cited in the decision below - a prior State Court suit sought to recover damages for fraud, while a later federal suit sought to recover money which the plaintiff paid into his former employer's pension fund.

This Court decided that the two causes of action are different; and that consequently, the judgment dismissing the prior suit in the State Court was not res judicata of the subsequent suit in the Federal Court. This Court

said:

> "*** while we agree with the trial court that the same parties or their privies are defendants in both suits, we do not find the requisite measure of identity of the two causes of action essential to support the trial court's finding of res judicata."

In Ma Chuck Moon v. Dulles, 237 F.2d 241 (C.A.2, 1956) - also cited in the decision below - the second suit alleged exactly the same facts, and presented exactly the same issues as the first suit, namely, whether the plaintiffs were children of a named citizen of the United States. A trial in the first suit resulted in findings of fact and a judgment that plaintiffs were not the children of such named citizen. The first suit was brought by the alleged father of the plaintiffs. The second suit was brought by the plaintiffs who alleged that the plaintiff in the prior suit was their father. In these circumstances, the Court decided that the second suit was barred by res judicata, because it presented the same factual issues which were decided in the prior suit.

Hudson Tire Mart, Inc. v. Aetna Casaulty & Surety Co., 518 F.2d 671, 673, (C.A.2, 1975) - also cited in the decision below - sought to enjoin defendant from conducting a pre-trial examination of the plaintiff under

an insurance policy in which the plaintiff, as the insured, agreed to cooperate with the insurer in the defense of any action. This has nothing to do with this case.

Rosenfeld v. Black, 336 F.Supp. 84, 92 (E.D.N.Y. 1972) also cited in the decision below - decided only that:

> "A settlement of a derivative suit should not be approved without binding all stockholders, past and present unless there is an independent claim for relief on behalf of the stockholders as a class, as distinct from the stockholders as derivative plaintiffs. *** If Mr. Heffernan has a personal contractual claim against Capital Fund, as he seems to suggest, the decree is not intended to bar him from asserting such a claim within the limits of contract law or estoppel."

Unlike Rosenfeld v. Black, supra, this case has nothing to do with settlement of a stockholders' suit. However, plaintiffs' claim that they did not authorize, ratify or participate in the acts charged against United, Local 363, JAC, is the kind of "personal claim" which the decision in the Rosenfeld case allowed to be prosecuted because approval of the settlement did not make the settlement res judicata of such claim.

CONCLUSION

THE JUDGMENTS APPEALED FROM SHOULD BE REVERSED, AND DEFENDANT'S MOTIONS TO DISMISS THE COMPLAINT, OR FOR SUMMARY JUDGMENT SHOULD BE DENIED. PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION SHOULD BE GRANTED.

December 20, 1976

Respectfully submitted,

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2 Copies Received

Date December 27, 1976

Firm Hon. Louis J. Lefkowitz

By L. Whitling